In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1769

CARL THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-6622

STEVEN TERESI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners contend that the indictment should have been dismissed because portions of the grand jury proceedings were not recorded. Petitioner Teresi contends that he was denied adequate discovery; that he was erroneously denied a new trial without an evidentiary hearing; and that the court erred in failing to give requested jury instructions.

After a jury trial petitioners and three co-defendants were convicted of conspiring to import tons of marijuana into the United States, in violation of 21 U.S.C. (1964 ed.) 176a. Petitioners were sentenced to

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terms of five years' imprisonment. The court of appeals affirmed (Pet. App. A; 493 F. 2d 305).[1]

During the trial, several unindicted co-conspirators and one Alexander Moore, a defendant who had previously pleaded guilty, testified for the government. Their testimony showed that in late 1969 petitioner Thompson had instructed them to engage boats for use in smuggling marijuana. In January 1970, Thompson, petitioner Teresi, and Moore went to Mexico to supervise the smuggling operation. The shipment of marijuana arrived by sea in Long Beach, California, where petitioners and Moore distributed it on February 11, 1970. The marijuana in question was never seized by the government.

1. Petitioners contend that the grand jury proceedings were selectively recorded, in violation of *United States* v. *Thoreson*, 428 F. 2d 654, 665 (C.A. 9). But as indicated by the court of appeals (Pet. App. A, p. 3; 493 F. 2d at 308):

> * * * [T]he Government answers that the "testimony of every witness who appeared before the Grand Jury in this case was recorded." Even if one assumes the presence of selective recordation, however, the [petitioners] have failed to demonstrate the "clear indication" of prejudice that *Thoresen* requires before an indictment may be dismissed for failure to record grand jury proceedings. *Thoresen, supra,* [478

[1] The court of appeals affirmed on March 12, 1974. A petition for rehearing in No. 73-1769 was denied on April 24, 1974. The petitions in Nos. 73-1769 and 73-6622 were filed on May 25, 1974, and April 25, 1974, respectively, and are out of time under Rule 22(2) of the Rules of this Court. "Pet. App. A" refers to Appendix A of the petition in No. 73-1769.

> F. 2d] at 666; *accord, United States* v. *Price,* 474 F. 2d 1223, 1226 (9th Cir. 1973). [Petitioners] speculate that a Government agent testified before the grand jury. Even if this were true, no such agent testified at [their] trial. * * * [D]efendants' counsel acknowledged at oral argument that copies of the transcripts of all trial witnesses who had testified before the grand jury were submitted to the trial court and to defense counsel a day or so before trial. They were therefore available to the defense for examination while the witnesses were available for cross-examination. *Dennis* v. *United States,* 384 U.S. 855, 875 (1966). [Footnote omitted.]

Petitioners also seek to establish prejudice attributable to alleged nonrecordation by conjecturing that the grand jury was presented hearsay testimony prior to the return of its indictment. *Costello* v. *United States,* 350 U.S. 359, however, established that an indictment issued by a grand jury before which only hearsay testimony was elicited may be sufficient. There is no showing in the instant case that the trial court abused its discretion in failing to dismiss the indictment. See *United States* v. *Fox,* 425 F. 2d 996, 1001 (C.A. 9).

Moreover, petitioner Thompson's suggestion that the recorded grand jury testimony of government trial witnesses which the prosecution turned over to the defense was given before a grand jury other than the one which indicted petitioners is merely speculative, as is his assertion that the grand jury heard only the

hearsay testimony of a government agent. Seven of petitioners' accomplices appeared before the grand jury which returned the indictment and all their testimoney was recorded. Petitioners were furnished with the grand jury testimony of all government trial witnesses.

2. Petitioner Teresi's contentions concerning the adequacy of discovery are unwarranted. Teresi's request to discover the results of any tests made on the marijuana did not satisfy the "relevancy" requirement of Fed. R. Crim. P. 16(a) or the "materiality" requirement of Fed. R. Crim. P. 16(b), since there was no seizure of marijuana in this case and the presence of marijuana was not material to this prosecution for *conspiracy* to smuggle marijuana.

The denial of Teresi's pretrial motion for disclosure of grand jury testimony was proper since there was no demonstration of any "particularized need" to examine the testimony at that time.[2] *Dennis* v. *United States,* 384 U.S. 855, 872–873; *United States* v. *Parker,* 469 F. 2d 884, 888–889 (C.A. 10); *United States* v. *Cole,* 449 F. 2d 194, 198 (C.A. 8), certiorari denied, 405 U.S. 931. Counsel for petitioners were provided copies of relevant testimony before the grand jury during the course of the trial and in time to facilitate effective cross-examination. Absent any express need for earlier disclosure, this was all that was necessary. *Dennis, supra,* 384 U.S. at 875.

[2] In petitioners' Motion for Pretrial Discovery, counsel merely stated that he "seeks these transcripts and records in order to prepare, among other things, for the trial as well as the motion to dismiss." C.T. at 44. This contrasts sharply with the "particularized need" evident in *Dennis, supra,* 384 U.S. at 872–873.

The court's denial of Teresi's motion for a witness list was not erroneous; in a noncapital case such as this, there is no entitlement to such a list prior to trial. *United States* v. *Glass,* 421 F. 2d 832, 833 (C.A. 9). Teresi further objects to the "concealment" of certain government witnesses during pretrial proceedings. The seclusion of such witnesses, however, was consistent with the lack of any requirement to disclose the identities of government witnesses prior to trial. *United States* v. *Glass, supra.* Such a procedure is also properly authorized by Fed. R. Crim. P. 16(d), (e).

Teresi next alleges that it was erroneous to deny him the opportunity, upon cross-examination of "the government witnesses," to discover the current addresses of these witnesses. The United States Attorney asserted in the court of appeals, however, that this information was provided to petitioner. The court of appeals concluded (Pet. App. A, p. 5; 493 F. 2d at 309) that even assuming that the information was not provided, the foreclosure of this inquiry on cross-examination, although erroneous, *Smith* v. *Illinois,* 390 U.S. 129, was harmless. In *Smith,* the "only real question at the trial" was the relative credibility of the defendant and the prosecution witness whose address was not disclosed, *Smith, supra,* 390 U.S. at 130.

3. In rejecting petitioner Teresi's contention that the district court erroneously denied his motion for a new trial, the court of appeals correctly ruled (Pet. App. A, p. 6; 493 F. 2d at 310):

> The decision whether or not to conduct an evidentiary hearing to consider a motion for a new trial is a matter of discretion. *United States* v. *Clay*, 476 F. 2d 1211, 1216 (9th Cir. 1973). Moreover, for a new trial motion to be granted, the movant must show that the newly discovered evidence is not merely cumulative and would "probably produce an acquittal." *Id.* at 1215. Teresi's "newly discovered evidence" was a possibility that two witnesses, in exchange for their testimony, had been promised a dismissal of criminal charges against them. The testimony of these two witnesses was not significant as to appellant Teresi. Given the presence of other testimony sufficiently establishing the existence of the conspiracy, and Teresi's participation in it, one cannot say that the use of the "newly discovered evidence" to attempt to impeach the credibility of these witnesses would, even if the impeachment were successful, "probably produce an acquittal." Appellant's motion for a new trial was properly denied. Cf. *Remmer* v. *United States*, 347 U.S. 227, * * * (1954). [Footnote omitted.]

4. Finally, with respect to petitioner Teresi's contention that the court erred in failing to give the requested jury instruction as to his co-defendant's mental competence, the court below said (Pet. App. A, pp. 6–7; 493 F. 2d at 310):

> [Petitioner] requested a jury instruction to the effect that, if the jury should find his co-defendant Thompson not guilty by reason of insanity, then Teresi, could not be considered a member of the conspiracy until it was shown that Teresi had conspired with one who was mentally competent. Since Thompson was found guilty, the refusal to give this instruction, even

if assumed to be erroneous, was harmless. *Kotteakos* v. *United States,* 328 U.S. 750, 764–765 * * * (1946); *Sang Soon Sur* v. *United States,* 167 F. 2d 431, 433 (9th Cir. 1948).

Petitioner Teresi also contends that the court erred in denying his requested instruction that the object smuggled as a result of this conspiracy must have been proved to be marijuana. The crime of conspiracy, however, is complete upon the agreement to violate the law, as implemented by one or more overt acts (however innocent in themselves they may be), and is not at all dependent upon the ultimate success or failure of the planned scheme. *United States* v. *Rabinowich,* 238 U.S. 78, 86–88; *Toliver* v. *United States,* 224 F. 2d 742, 744 (C.A. 9). Thus, whether or not marijuana was in fact obtained is irrelevant.

Petitioner Teresi also contends that he was entitled to a jury instruction which would indicate that 18 U.S.C. 371 was a lesser included offense of 21 U.S.C. 176a (conspiracy to smuggle marijuana). But since both these statutes might be applied to the same criminal conduct, the particular statute (21 U.S.C. 176a) prevails over the general one. *Conerly* v. *United States,* 350 F. 2d 679, 681–682 (C.A. 9), certiorari denied, 382 U.S. 1018; *Enzor* v. *United States,* 262 F. 2d 172, 174 (C.A. 5), certiorari denied, 359 U.S. 953.

Petitioner Teresi's final argument relates to the denial of his requested entrapment instruction. Since Teresi did not admit the acts constituting the crime charged, however, the defense of entrapment was not available to him. *United States* v. *Hendricks,* 456 F. 2d 167, 169 (C.A.).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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